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No. _____

In the Supreme Court of the United States

Commonwealth of Kentucky, Natural Resources And Environmental Proctection Cabinet, Secretary,
Petitioner,

v.

United States of America,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Randall G. McDowell
Counsel of Record
Mark A. Posnansky
Natural Resources and Environmental Protection Cabinet
Office of Legal Services
Fifth Floor, Capital Plaza Tower
Frankfort, KY 40601
(502) 564-5576

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

1. Does the doctrine of preemption prevent a State from imposing conditions on the United States regarding the disposal of radiation-contaminated solid waste in a State-licensed solid waste landfill?

2. Does the doctrine of sovereign immunity prevent a State from imposing conditions on the United States regarding the disposal of radiation-contaminated solid waste in a State-licensed solid waste landfill?

PARTIES TO THE PROCEEDINGS

Petitioner

The Petitioner in this action is the Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet.

Respondent

The Respondent in this action is the United States of America, Department of Energy.

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The Commonwealth of Kentucky (hereinafter "Kentucky") respectfully requests that this Court issue a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Sixth Circuit (hereinafter "the Sixth Circuit").

OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 252 F.3d 816 (6th Cir. 2001), and is reproduced in App. A at 1a-20a. The memorandum opinions and orders of the United States District Court for the Western District of Kentucky are unreported and are reproduced in App. B at 23a-25a; App. C at 26a-27a and App. D at 28a-42a.

JURISDICTION

The opinion of the Sixth Circuit was issued on June 5, 2001. No petition for rehearing has been filed. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides that "[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."

The Tenth Amendment of the United States provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

42 U.S.C. Section 6901(a) reads, in pertinent part, as follows:

> "The Congress finds with respect to solid waste-
>
> (4) that while the collection and disposal of solid waste should continue to be primarily the function of the State, regional, and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate federal action."

42 U.S.C. Section 6903(27) reads, in pertinent part, as follows:

> "The term 'solid waste' means any garbage, refuse, sludge from a waste treatment plant... but does not include source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended."

42 U.S.C. Section 6905(a) reads, in pertinent part, as follows:

> "Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to... the Atomic Energy Act of 1954 [42 U.S.C. Section 2011et seq.] except to the extent that such application (or regulation) is not inconsistent with the requirements of such Act[s]."

STATEMENT OF THE CASE

The United States of America, through the Department of Energy (hereinafter "DOE"), owns and operates the Paducah Gaseous Diffusion Plant, a uranium enrichment facility, in Paducah, Kentucky. The enriched uranium is used as a fuel, both for national defense and domestic energy production. However, this fuel has not come without cost. The plant, a product of the Cold War era, is a toxic Superfund site[1] listed by the United States Environmental Protection Agency (hereinafter "the EPA") on the National Priorities List due to its propensity for releasing hazardous waste and hazardous substances - including radioactive waste – into the environment.

DOE has been attempting to clean up the environmental contamination caused by the plant pursuant to oversight by the EPA and Kentucky. As part of its clean-up efforts, DOE sought a license from Kentucky to construct a landfill to dispose of solid waste[2] generated at the plant. Kentucky regulates the disposal of solid waste within its borders by and through permits that are issued by its Natural

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[1] 26 U.S.C. Section 9507; 42 U.S.C. Section 9601 et seq.

[2] Kentucky law defines "solid waste" as "any garbage, refuse, sludge, and other discarded material... resulting from industrial, commercial, mining... agricultural operations, and from community activities, but does not include... source, special nuclear or byproduct materials as defined by the Atomic Energy Act of 1954, as amended." Kentucky Revised Statutes (hereinafter "KRS") 224.01-010(31)(a).

Resources and Environmental Protection Cabinet (hereinafter "the Cabinet")[3].

In November 1994, DOE submitted an application for a permit to construct the landfill. The Cabinet issued a permit authorizing construction of the landfill in February 1995, and a permit authorizing operation of the landfill in November 1996.

During the application process it became clear that the solid waste from the plant was contaminated by radiation from radioactive materials and radioactive waste. For that reason the permit issued by Kentucky contained certain conditions designed to ensure that no radioactive waste and only a limited (*de minimus*) amount of solid waste contaminated by radioactivity be allowed in the landfill.

DOE objected to the permit conditions and, pursuant to Kentucky law,[4] filed an administrative challenge. DOE argued that the permit conditions imposed by Kentucky were invalid on the grounds that they constituted an attempt by the state to regulate source, special nuclear and byproduct material, an area exclusively reserved to the federal government.

The Kentucky hearing officer recommended that the Secretary of the Cabinet affirm the permit conditions. DOE filed exceptions to the hearing officer's report, but the Secretary of the Cabinet overruled them and issued a final

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[3] Throughout this Petition, "Kentucky" and "the Cabinet" will be used interchangeably.

[4] KRS 224.10-420(2).

administrative order affirming all of the conditions contained in the permit.

Pursuant to Kentucky law,[5] DOE then filed a timely petition in the state circuit court challenging the order of the Secretary and asking that it be set aside. The petition set forth the same grounds that were subsequently presented to the federal district court.

On April 1, 1999, only ten days after filing its state action, DOE filed a complaint in the federal district court seeking declaratory and injunctive relief. In its petition DOE asserted essentially the same grounds it had argued in the administrative forum and the same ones it had advanced to the state circuit court. Kentucky moved to dismiss the complaint, arguing that it had the right to impose the conditions it had and that it was engaging in the regulation of solid waste, not the regulation of nuclear materials. Kentucky further argued that the federal court should decline jurisdiction and abstain from hearing the case in light of the pending state circuit court action.

On November 5, 1999, the district court denied Kentucky's motion to dismiss and held that the conditions placed in the permit constituted the regulation of nuclear materials and, hence, were preempted by federal law. The court further held that it was not required to decline jurisdiction based upon the pending state court action.

Kentucky appealed the decision of the district court to the Sixth Circuit. After full briefing, that Court affirmed the decision of the lower court.

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[5] KRS 224.10-470(1).

A. Background

In 1954, the Atomic Energy Act, 42 U.S.C. Section 2011-2297g-4 (hereinafter "the AEA") was enacted by Congress to promote the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. *Pacific Gas and Electric Company v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983). The federal government's control is intended to be limited to the safety and nuclear aspects of energy generation. The states are intended to retain their traditional control over such things as electrical utilities, non-nuclear power and the disposal of solid and hazardous waste. *Id.* at 205.

The AEA regulates three different types of radioactive material: source material, special nuclear material and byproduct material. 42 U.S.C. Section 2041(e), (z), (aa) (hereinafter "AEA materials"). Under the AEA, the federal government, through the DOE and the Nuclear Regulatory Commission, is granted exclusive responsibility for regulating AEA materials. 42 U.S.C. Section 2201(b), (i)(3). It is intended that the federal authority have broad power to control the release of radioactivity into the atmosphere. The federal government's control over nuclear matters extends to the characterization, treatment and control of nuclear waste. *Radioactive Waste Management*, DOE Order 435.1 (1999). Significantly, however, the AEA does not address the issue of the disposal of solid waste contaminated with radioactive waste.

In 1965, Congress enacted the Solid Waste Disposal Act (hereinafter "the SWDA"). 42 U.S.C. Sections 6901-6992k. The purpose of SWDA was to address the issue of the proper management of solid and hazardous waste. It was the

manifest intent of Congress, as set out in 42 U.S.C. Section 6901(a)(4), that the states continue to enjoy their historic power to direct and control the management and disposal of such wastes.

The law clearly seeks to distinguish the regulation of solid waste – an area reserved to the states – from the regulation of AEA materials – an area reserved to the federal government. The SWDA expressly states that "solid waste" does not include "source, special nuclear or byproduct material as defined in the Atomic Energy Act of 1954." 42 U.S.C. Section 6903(27). The Act further states that it does not apply to "any activity or substance which is subject to ... the Atomic Energy Act of 1954 **except to the extent that such application (or regulation) is not inconsistent with the requirements of the Act[ ].**" 42 U.S.C. Section 6905(a) (emphasis added). Thus Congress has expressed a clear intent that the SWDA does apply to AEA materials in certain circumstances.

B. The Proceedings Below

The permit in question was issued to DOE on November 4, 1996. A number of conditions were placed in the permit pertaining to radioactive materials, but the two conditions in issue are: (1) DOE is prohibited from depositing solid waste that exhibits radioactivity above de minimus levels in the landfill (Permit Condition 11); and (2) DOE is prohibited from depositing solid waste that contains radionuclides in the landfill until a waste characterization plan has been submitted to the Cabinet for review and approval (Permit Condition 12).

DOE challenged the issuance of the permit by filing a timely administrative appeal in the Cabinet's Office of

Administrative Hearings. A total of five permit conditions were attacked, but only the ones relating to Conditions 11 and 12 are pertinent to the instant case. DOE argued, *inter alia*, (1) that the AEA preempts Kentucky's authority to impose conditions relating to radioactive solid waste and (2) that the federal government had not relinquished sovereign immunity for the imposition of the state permit conditions.

After reviewing cross motions for summary disposition, the Cabinet's hearing officer granted partial summary disposition in Kentucky's favor regarding three of the disputed permit conditions, but denied summary disposition as to Conditions 11 and 12. Thereafter further discovery was taken and new cross motions for summary disposition were filed.

On January 15, 1999, the hearing officer recommended to the Secretary of the Cabinet that judgment be entered in Kentucky's favor and that Permit Conditions 11 and 12 be upheld. The hearing officer concluded that the disputed permit conditions did not regulate AEA materials, were supported by the evidence, and were in compliance with all statutory and regulatory requirements. DOE filed exceptions to the recommendation of the hearing officer, but the Secretary of the Cabinet overruled them and on February 18, 1999, entered a final order upholding all of the conditions contained in the permit.

On March 22, 1999, DOE filed a state action in the Franklin Circuit Court of Kentucky challenging the final order of the Secretary of the Cabinet. Under KRS 224.10-470(1), such an action is necessary in order to preserve a challenge to

a final order of the Secretary of the Cabinet. The petition challenged Conditions 11 and 12 of the permit.[6]

On April 1, 1999, DOE filed a complaint for declaratory and injunctive relief in the federal district court challenging Conditions 11 and 12 of the permit on federal preemption and sovereign immunity grounds. On April 27, 1999, Kentucky filed a motion to dismiss the complaint arguing, *inter alia*, that the disputed permit conditions regulate solid waste, not AEA materials, and therefore violate neither preemption nor sovereign immunity. Kentucky further argued that the federal court should abstain from reviewing the case under the authority of *Burford v. Sun Oil Company*, 319 U.S. 315 (1943) since there was a state court action pending.

On November 5, 1999, the district court, in a memorandum opinion, denied Kentucky's motion to dismiss, stating as follows:

> "...AEA governs the source, special nuclear and byproduct components of hazardous and radioactive waste mixtures. RCRA governs all other portions of the mixture. AEA preempts [Kentucky's] regulation of source, special

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[6] DOE moved to stay the state action subsequent to filing its federal action in the United States District Court. The state court has not formally ruled on that motion, but no proceedings have ever taken place.

nuclear and byproduct components of hazardous waste mixtures."[7]

App. D at 42a.

The court's opinion neither articulates how it reached the factual conclusion that the Cabinet was regulating AEA materials nor did it point to one single inconsistency between the AEA and the permit conditions. Additionally the court held that it was not required to abstain from deciding the case since it involved "facially conclusive claims of federal preemption, where the resolution of the dispute does not require the court to interpret state law or make factual findings." *Bunning v. Kentucky*, 42 F.3d 1008 (6th Cir. 1994).

On December 6, 1999, Kentucky filed a motion to reconsider, arguing that the memorandum opinion neither explained how it reached its finding regarding Kentucky's purported regulation of AEA materials nor demonstrated any inconsistency between the permit conditions and the dictates of the AEA.

On December 17, 1999, the district court issued its memorandum opinion and order denying the Cabinet's motion to reconsider and dismissing the action. The Court again failed to address the issue of whether there was any inconsistency between the permit conditions and the AEA, instead reiterating that the state "cannot effect regulations that result in the regulation of the source, special nuclear and

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[7] The district court corrected its reference to hazardous waste in its December 17, 1999 Memorandum Opinion and Order. App. B at 24a.

byproduct material portion of a solid waste mixture... Inasmuch as the regulations effect any type of regulation on the source, special nuclear and byproduct material, the regulation is improper and preempted by the Atomic Energy Act." Appendix B at 24a.

On June 5, 2001, the Sixth Circuit affirmed the order of the district court. The court held that "[t]he permit conditions ... represent an attempt by the Cabinet to regulate materials covered by the AEA based on the Cabinet's safety and health concerns, and are thus preempted." App A at 10a-11a. Additionally, the court rejected Kentucky's argument that the district court should have identified conflicts between the permit conditions and the AEA. Quoting *Pacific Gas, supra,* at 213, the Court stated as follows:

> "When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" [Citation omitted]. Under such test, DOE need not identify specific conflicts between the Cabinet's permit conditions and federal law in order to establish preemption.

App. A at 13a.

Although the district court did not address the issue of federal sovereign immunity, the Sixth Circuit held that DOE could have prevailed on that ground as well. "Neither the AEA nor any other federal law waives federal immunity from regulation of DOE facilities by states with respect to materials covered by the AEA." App. A at 14a. While the court

acknowledged that federal immunity was waived with respect to state regulation of solid waste, it held that no such waiver was applicable to nuclear materials. Hence, sovereign immunity applied.

Though not being raised in the instant petition to this Court, the Sixth Circuit also ruled in DOE's favor on the abstention issue The Court affirmed the district court's finding that abstention was inappropriate, holding that "because DOE presented a facial preemption claim, the district court properly found that it should not abstain in deference to the state court proceeding." App.A at 17a.

REASONS FOR GRANTING THE WRIT

I. There Is A Conflict Among The Circuits Regarding The Question Of Whether The State Was Engaging In The Regulation Of Source, Special Nuclear Or Byproduct Material Under The Facts Of This Case.

A. Preemption

There are two conditions of the DOE permit in issue in this case. The first, Condition 11, prohibits DOE from placing solid waste that exhibits radioactivity above *de minimis* levels into the landfill. The second, Condition 12, prohibits DOE from placing solid waste containing radionuclides in the landfill until a waste characterization plan has been submitted to the Cabinet for review and approval. The Sixth Circuit, affirming the federal district court, held that the above conditions "represent an attempt by the Cabinet to regulate materials covered by the AEA ... and are thus preempted." App. A at 10a-11a..

In a strikingly similar case, *United States v. State of New Mexico*, 32 F.3d 494 (10th Cir. 1994), the court arrived at precisely the opposite conclusion. The facts of that case are remarkably on point. Like the instant case, *New Mexico* also concerned a waste disposal facility owned by DOE. Like the instant case, the facility was permitted by the state and DOE disposed of both a state-regulated waste (hazardous) and a federally-regulated waste (radioactive) in the facility. Like the instant case, the state placed conditions on the permit pertaining to the disposal of the radioactive materials, specifically limiting it to *de minimis* amounts to ensure that DOE disposed of only the type of waste for which the facility had been permitted. Like the instant case, the federal authority challenged the state's right to impose the permit conditions.

But unlike the instant case, the United States Court of Appeals for the Tenth Circuit (hereinafter "the Tenth Circuit") specifically found that the actions of the state did not amount to the regulation of AEA materials. The Court held as follows:

> ...it does not appear that the state is attempting to substantively regulate radioactive waste through this condition. The ten percent standard can be seen as a cut-off point beyond which it may be reasonably assumed that there is more than a de minimis level of radioactive material in the hazardous waste burn. In this way, condition V.F.9 is merely another tool for New Mexico to implement its statutory and regulatory hazardous waste provisions.
>
> ...We reject the United States' reading of the permit condition. A plain reading of the

> condition's language suggests that "background" should be measured when the incinerator is operating and prepared to incinerate, but no waste has been introduced. A measurement at that time produces the "background" which the permit condition requires not be surpassed by certain parameters. *Further, the language requiring measurement from time-to-time emphasizes New Mexico's position that it is not engaging in the substantive regulation of radionuclides, but simply attempting to ensure compliance with New Mexico's statutory requirements.* (Emphasis added.)

32 F.3d at 498-499.

Kentucky cited *New Mexico* to the federal district court and to the Sixth Circuit, but both courts held that the case was not dispositive of the instant case because *New Mexico* was not decided on preemption grounds, but rather on the issue of whether the state conditions were in fact requirements under state law. But Kentucky respectfully disagrees and asserts that that is beside the point. The Tenth Circuit specifically found that the state was not engaging in the regulation of nuclear materials. That is the critical point and the Tenth Circuit's finding is diametrically opposed to the Sixth Circuit's holding in this case.

For our purposes, it makes little difference that the Tenth Circuit did not face the issue of preemption. That is a distinction without a difference. *Without regulation, there can be no preemption.*

It is not difficult to understand why the federal government did not argue preemption in *New Mexico*. There was no regulation, hence no preemption. The lower court made that determination and, as footnote 4 of *New Mexico* denotes, the federal government did not challenge that determination. The Tenth Circuit, moreover, in the language quoted above specifically affirmed that point.

The basis of the Sixth Circuit's ruling regarding preemption seems to rest upon its conclusion that the federal government "completely occupies" the field of radioactive materials. *Pacific Gas, supra,* at 212. However, Kentucky respectfully submits the Court's reliance on that case is misplaced. *Pacific Gas* did not deal with the regulation of solid waste, but rather with a California state law relating purely to the construction of new nuclear power plants. Solid waste is distinctly different because (1) the states have explicit power to regulate solid waste and (2) the SWDA, by its very terms, precludes state action only where there is an inconsistency with federal law. That critical distinction was not present in *Pacific Gas*. That case, therefore, serves as no precedent for this case.

Under the Tenth Amendment the states retain all powers not specifically surrendered. *Sperry v. State of Florida*, 373 U.S. 379 (1963). Providing for the health and safety of its citizens has historically been within the parameters of a state's legitimate police powers. *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). And it is well settled, moreover, that the regulation of solid waste is an activity that falls squarely within those police powers. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). What Kentucky was attempting to do in this case falls squarely under that historic right. It was merely trying to exercise its legitimate right to regulate solid waste within its borders.

The ruling of the Sixth Circuit in the instant case conflicts directly with the opinion of the Tenth Circuit in *New Mexico*. Contrary to the language of the Sixth Circuit, there is no way to reconcile the two cases. Both states were imposing limitations on the federal government relating to the disposal of AEA materials in a federally owned and state-licensed waste facility. The Tenth Circuit held that such did not amount to the regulation of AEA materials, the Sixth Circuit did. The bottom line is that if there was no regulation in New Mexico there was none in Kentucky. The two opinions are in conflict. Certiorari should be granted.

B. Sovereign Immunity

Kentucky readily concedes that the Supremacy Clause of Article VI of the Constitution ensures, absent an express waiver, that the "activities of the Federal Government are free from regulation by any state." *Mayo v. United States*, 319 U.S. 441, 445 (1943). A state is without power to provide or impose conditions on how or when the federal government will effectuate its purposes. *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963). But it is also well settled that the simple existence of a state law and a federal law on the same subject does not necessarily result in the invalidity of the state law. It must be established that the application of the state law would somehow frustrate the federal law. *Perez v. Campbell*, 402 U.S. 637 (1971); *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 372 U.S. 714 (1963).

The Sixth Circuit, while noting that the federal district court had not addressed the issue, nevertheless held that DOE should prevail on federal sovereign immunity grounds as well as on preemption grounds. The Court stated that "[n]either the AEA nor any other federal law waives federal immunity

from regulation of DOE facilities by states with respect to materials covered by the AEA." App.A at 14a.

Kentucky does not accept the premise that its permit conditions regulate AEA materials. However, even if one assumes that they do, the Sixth Circuit's ruling ignores the express waiver of sovereign immunity found in 42 U.S.C. Section 6905(a). That provision states clearly that the SWDA applies to AEA materials **except to the extent that such application is inconsistent with the requirements of the AEA.** Thus, immunity is waived regarding state requirements not inconsistent with the AEA. Unless the Cabinet's permit requirements are shown to be inconsistent with the AEA, immunity does not apply.

The same argument applies to this issue as applies to the issue of preemption. There is a sharp conflict between the Sixth Circuit and the Tenth Circuit with respect to whether the states were in fact engaging in the regulation of AEA materials. If there was no regulation occurring, there could be no immunity just as there could be no preemption.

Kentucky takes no issue with the principle that the federal government occupies the entire field regarding the management and regulation of purely nuclear materials. But the states clearly retain some rights under the law, especially where there is a mixture of AEA materials and of solid waste as there is in this case. In the absence of a conflict with federal law, the states retain full power to regulate solid waste within their borders.

If the Cabinet believed it were in the business of regulating AEA materials, it would not be approaching this Court regarding this issue. But like New Mexico, Kentucky

is only exercising its legitimate and legal responsibility to regulate solid waste within its own borders.

The central issue is whether the Cabinet was, by placing Conditions 11 and 12 in the permit, regulating AEA materials. The Sixth Circuit and the Tenth Circuit obviously disagree on the answer to that question. This Court should therefore grant certiorari.

II. The Question Presented Is Important

It has long been recognized that the regulation of solid waste is a function of the states and localities. This has been explicitly recognized by Congress and is codified in federal law by the SWDA at 42 U.S.C. Section 6901(a)(4) ("the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies..."). The importance of this responsibility is also emphasized in subsection (b)(2) of the same statute which notes that "disposal of solid and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment."

Kentucky has an obligation to ensure the protection of human health and the environment with respect to the disposal of solid waste. Kentucky has attempted to meet its responsibilities to control solid waste by enacting statutes to ensure that only solid waste is deposited in a contained landfill.[8] Like other states, Kentucky enforces adherence to its laws and regulations relating to solid waste by the imposition of criminal and civil sanctions and by the issuance

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[8] KRS 224.10-100; KRS 224.40-100; KRS 224.40-305; KRS 224.40-310.

of state solid waste permits. Without the necessary latitude to tailor a solid waste permit to meet the exigencies of the given situation, a state simply cannot fulfill its obligations to fully protect its citizenry from the dangers of solid waste.

By issuing a solid waste permit the state is, in effect, assuring its citizens that it has determined that such waste can safely be disposed of within the state. However, the Sixth Circuit's ruling in this case emasculates Kentucky's ability to determine the most fundamental aspect of solid waste disposal, i.e., what kind of waste is to be placed in the landfill. The Court's ruling ties the hands of Kentucky and every other state by eliminating its power to issue solid waste permits geared to meet the special needs and circumstances of an individual case. Quite simply, a state cannot ensure the safety and health of its citizens under such conditions.

The solid waste facility involved in this case - a federally owned facility – is permitted by the state. Such facilities (e.g. the New Mexico facility in the case cited above) are becoming increasingly commonplace in the United States. Typically such facilities – like the one in this case and the one in New Mexico - deal with both radioactive and non-radioactive materials. These facilities generate waste that has to be disposed of somewhere. This is an area of vital and legitimate concern to citizens, but the opinion of the Sixth Circuit effectively strips the states of any ability to deal with this problem.

The right of the states to regulate solid waste is a historic and well-recognized right. The right of the federal authority to regulate AEA materials is a historic and well-recognized right. Congress clearly sought to strike a balance between the two by saying that states enjoy their traditional right to regulate solid waste (even when AEA materials are

involved) so long as they don't do so inconsistently with federal law. When such an inconsistency occurs, federal law takes precedence. The opinion of the Sixth Circuit, however, fails to recognize this balance. It has changed the law by saying that as long as AEA materials are involved, the states forfeit all of their power and that no inconsistency or conflict need be shown. That is clearly not what Congress intended. This Court should accept certiorari and correct this imbalance.

III. The Decision Of The Court Of Appeals Is Erroneous

Not only is there a conflict in terms of how the federal circuits are viewing what constitutes the regulation of nuclear energy by the states in the course of dealing with solid waste, and not only is this a vitally important topic, but a close examination of this case leads to the conclusion that this case was incorrectly decided by the Sixth Circuit. The Cabinet was not, in fact, engaging in the regulation of nuclear materials.

In point of fact, Conditions 11 and 12 of the solid waste permit do not regulate AEA materials in any way. While those conditions address solid waste contaminated with radionuclides, including uranium and technetium-99, they in no way substantively direct, manage, regulate or set requirements for them.

Conditions 11 and 12 are, in the purest sense, the regulation of solid waste. Condition 11 serves to ensure that only solid waste is disposed of in the landfill by prohibiting disposal of solid waste that contains radioactivity above *de minimis* levels. The subject and focus of this requirement is solid waste, not radioactivity. The goal to be attained is the

safe disposal of solid waste. It is submitted that any objective interpretation of Condition 11 would have to conclude that it is directed at the disposal of solid waste. While radioactive materials are involved, they are incidental to that main focus.

Likewise, Condition 12 of the permit clearly constitutes regulation of solid waste, not AEA materials. Condition 12 is simply a requirement for a waste characterization plan. It does not even arguably regulate AEA materials. Rather, it only requires DOE to submit a blueprint in order to determine the amount of radioactive contamination and to provide the Cabinet with a mechanism to enforce its regulatory requirement that only solid waste can be disposed of in a solid waste facility.

Neither Condition 11 nor 12 of the permit in any way dictate to the federal government what it must do with its radioactive waste or how it is to dispose of it. As such, there is simply no regulation.

There is yet another reason why the decision of the Sixth Circuit is erroneous. Neither the district court, the Sixth Circuit nor DOE has ever shown how Conditions 11 and 12 of the permit in fact conflict with the AEA or with federal law in any way. Indeed there is no such conflict present. As Kentucky has previously asserted, before there can be preemption invalidating state regulation, there must be actual conflict with federal law demonstrated. 42 U.S.C. Section 6905(a).

The Sixth Circuit was incorrect in holding that DOE was under no compulsion to identify any specific conflicts between the Kentucky permit conditions and the federal law in order to establish preemption. The Cabinet submits, in all due respect, that the Court misinterprets *Pacific Gas, supra*,

in this regard. While the test of whether there can be preemption requires *first* an analysis of whether the federal government in fact "completely occupies a given field," there must necessarily be a *second* inquiry as to whether there is in fact an inconsistency or conflict before a state standard is to be invalidated. The Sixth Circuit has completely omitted this second inquiry.

Kentucky's position finds support in the relevant case law as well as in the SWDA. Before the state standard is voided, it must be shown to retard or impede the operation of the federal law. "[A] state law cannot stand that 'either frustrates the purpose of the national legislation or impairs the efficiency of those agencies of the Federal government to discharge the duties, for the performance for which they were created.'" *Nash v. Florida Industrial Commission*, 389 U.S. 235, 240 (1967).

"The test of whether both federal and state regulations may operate, or whether the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, *not whether they are aimed at similar or different objectives.*" *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (emphasis added).

Conditions 11 and 12 of the Kentucky solid waste permit in no way impair the goals and objectives of the AEA. That has never been shown or even alleged. Rather, DOE has consistently taken the position that it doesn't matter what the Cabinet's permit conditions do or do not do, that the only question is whether they deal with AEA materials and, if so, they are preempted and cannot stand. That rationale obviously fails to comport with this Court's holding in *Florida Lime*.

Both the federal district court and the Sixth Circuit incorrectly decided this case. This Court should accept certiorari and correctly apply the law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Randall G. McDowell
Mark A. Posnansky
Natural Resources and Environmental
Protection Cabinet
Office of Legal Services
Fifth Floor, Capital Plaza Tower
Frankfort, Kentucky 40601
(502) 564-5576
(502) 564-6131 (Facsimile)

Counsel for Petitioner
Commonwealth of Kentucky,
Natural Resources and Environmental
Protection Cabinet, Secretary

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 5, 2001, Filed]

No. 00-5247

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
COMMONWEALTH OF KENTUCKY; KENTUCKY NATURAL RESOURCES & ENVIRONMENTAL PROTECTION CABINET, SECRETARY, Defendants-Appellants.	)

JUDGES:

Before: NORRIS and COLE, Circuit Judges; STEEH, District Judge.*

* The Honorable George Caram Steeh, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

R. GUY COLE, JR., Circuit Judge.

The Commonwealth of Kentucky, acting through the Secretary of the Kentucky Natural Resources and Environmental Protection Cabinet ("Cabinet"), appeals from the district court's ruling that federal law preempts permit conditions imposed by the Cabinet relating to the disposal of radioactive waste in a landfill operated by the United States Department of Energy ("DOE"). For the following reasons, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

The Paducah Gaseous Diffusion Plant (the "Plant") is an active uranium enrichment facility owned by the DOE, located in McCracken County, Kentucky. The Cabinet regulates disposal of solid waste at the Plant through the issuance of permits. In 1994, DOE submitted a permit application to the Cabinet for the construction and operation of a contained solid waste landfill at the Plant. In February 1995, the Cabinet issued a permit to DOE authorizing the construction of the landfill.

After verifying that DOE had completed construction in accordance with the approved plans, the Cabinet issued another permit to DOE on November 4, 1996, authorizing operation of the landfill. This operating permit contained conditions relating to the disposal of radioactive materials in the landfill. Specifically, Condition 11 prohibited DOE from placing in the landfill "solid waste that exhibits radioactivity above de minimis levels." Condition 12 prohibited DOE from

placing in the landfill "solid waste that contains radionuclides . . . until a Waste Characterization Plan for radionuclides has been submitted to the Division of Waste Management for review and approval."

DOE appealed the imposition of these permit conditions through Kentucky's administrative process. On January 15, 1999, a state Hearing Officer issued a report recommending that the Secretary affirm the Cabinet's imposition of the challenged permit conditions. DOE filed objections and the Cabinet responded. On February 18, 1999, the Secretary entered a final order affirming and adopting the Hearing Officer's report and recommendation. The Secretary accordingly dismissed DOE's administrative appeal.

DOE then filed a petition for judicial review of the Cabinet's final action in Kentucky state court on March 22, 1999. Under Kentucky law, DOE was required to file its petition for state court review of the Cabinet's action within thirty days of the Cabinet's final order. **See** Ky. Rev. Stat. § 224.10-470(1). DOE alleges that it filed its state court action to preserve its rights under state law.

On April 1, 1999, ten days after filing its state court action, DOE filed the instant action in the United States District Court for the Western District of Kentucky seeking declaratory and injunctive relief. In its complaint, DOE challenged the permit conditions at issue on the grounds that: (1) the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2297g-4, preempts state regulations relating to the disposal of radioactive materials; (2) the conditions violate the federal government's sovereign immunity from state regulation; and (3) the Commonwealth failed to comply with its own statutes

and regulations in imposing the conditions. On April 27, 1999, the Cabinet filed a motion to dismiss DOE's complaint, arguing that: (1) the district court should decline jurisdiction over DOE's action based upon the discretion accorded it under the Declaratory Judgment Act, 28 U.S.C. § 2201, and under the *Burford* abstention doctrine, *see Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943); (2) DOE's preemption and sovereign immunity claims fail to state a claim for which relief can be granted; and (3) the challenged permit conditions comport with Kentucky law.

The district court denied the Cabinet's motion to dismiss on November 5, 1999. The court found that it was not required to decline jurisdiction over the case inasmuch as DOE had presented a facially conclusive claim of federal preemption, the resolution of which did not require the court to interpret state law or make factual findings. The court further found that federal law preempts the Cabinet's attempt to regulate DOE's disposal of radioactive waste in the landfill. The court accordingly entered judgment for DOE and dismissed the case.

On appeal, the Cabinet argues that: (1) the district court erred in concluding that the challenged permit conditions are preempted by federal law; and (2) the district court should have abstained from hearing this case based upon the discretion accorded it under the Declaratory Judgment Act and the *Burford* abstention doctrine.

II. DISCUSSION

A. Statutory and Regulatory Overview

Congress enacted the Atomic Energy Act ("AEA") in 1954 to promote the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206-07, 75 L. Ed. 2d 752, 103 S. Ct. 1713 (1983). Congress has subsequently amended the AEA to create a dual regulatory structure, whereby the federal government regulates the "radiological safety aspects involved in the construction and operation of a nuclear plant," and the states "retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, costs, and other related state concerns." *Id.* at 205.

The AEA regulates three different classes of radioactive material: source material, special nuclear material, and byproduct material. *See* 42 U.S.C. § 2014(e), (z), (aa). Source material includes uranium, thorium, and other materials that DOE deems necessary for the production of special nuclear material. 42 U.S.C. §§ 2014(z), 2091. Special nuclear material includes plutonium, enriched uranium, and other material capable of releasing substantial quantities of atomic energy. 42 U.S.C. §§ 2014(aa), 2071. Byproduct material includes "(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of

uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e).

The AEA grants DOE and the Nuclear Regulatory Commission exclusive responsibility for regulating source, special nuclear, and byproduct material. *See* 42 U.S.C. § 2201(b), (i)(3). Pursuant to this authority, DOE has developed and implemented an extensive regulatory regime for managing radioactive materials and limiting the release of radioactivity. *See*, e.g., General Environmental Protection Program, DOE Order 5400.1 (1988); Radiation Protection of the Public and the Environment, DOE Order 5400.5 (1990); Radioactive Waste Management, DOE Order 435.1 (1999) (establishing requirements for managing low-level radioactive waste, including waste characterization, waste treatment, disposal, and environmental monitoring). These regulatory standards are designed to assure that the public, workers, and the environment are not exposed to unsafe levels of radiation. *See* DOE Order 435.1 § 4.

In 1976, Congress passed the Resource Conservation and Recovery Act ("RCRA"), which amended the Solid Waste Disposal Act of 1965, 42 U.S.C. §§ 6901-6992k. Congress enacted the RCRA to end the environmental and public health risks associated with the mismanagement of hazardous waste. *See Sierra Club v. United States Dep't of Energy*, 734 F. Supp. 946, 947 (D. Colo. 1990). Generally, the RCRA prohibits the treatment, storage, or disposal of hazardous waste at private or governmental facilities without a permit issued by either the United States Environmental Protection Agency ("EPA") or an authorized state. *See id.*; 42 U.S.C. §§ 6925(a), 6961. The RCRA expressly contemplates

that state and local governments will play a lead role in solid waste regulation. *See* 42 U.S.C. § 6901(a)(4).

Under the RCRA, hazardous waste is defined as "solid waste, or [a] combination of solid wastes[,]" that, for enumerated reasons, creates public health and environmental dangers. 42 U.S.C. § 6903(5). "Solid waste," however, does not include "source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954." 42 U.S.C. § 6903(27). Indeed, the RCRA expressly provides:

> Nothing in this chapter shall be construed to apply to (or to authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to . . . the Atomic Energy Act of 1954 except to the extent that such application (or regulation) is not inconsistent with the requirements of such Act[].

42 U.S.C. § 6905(a).

B. Preemption

Under the Constitution's Supremacy Clause, U.S. Const. art VI, § 2, Congress may preempt state law so long as it acts within its constitutionally delimited powers. *See McCulloch v. Maryland,* 17 U.S. 316, 427, 4 L. Ed. 579 (1819) ("It is of the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.") The Supreme

Court has established a general framework by which preemption questions are analyzed:

> State law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248, 78 L. Ed. 2d 443, 104 S. Ct. 615 (1984). Whether a federal statute preempts state or local law is a question of federal law, *see Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1257 (6th Cir. 1996), which we review *de novo, see GTE Mobilnet v. Johnson*, 111 F.3d 469, 475 (6th Cir. 1997).

The district court noted that while the RCRA governs the disposal of hazardous waste, and the AEA governs the disposal of radioactive waste, no statute specifically delegates authority to regulate a mixture of the two types of waste. [1]

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[1] DOE acknowledges that the waste it intends to place in the landfill contains both a radioactive component (*i.e.*,"source, special nuclear, and byproduct material") and a non-radioactive component. As such, a mixture of solid waste and radioactive waste comprises the waste in question in this case.

Accordingly, the district court turned to the relevant federal agencies' construction of the AEA and RCRA for interpretative guidance. *See Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984) (requiring courts to give considerable weight to executive department's construction of a statutory scheme it administers and deference to its administrative interpretations). The court found that, according to DOE and EPA rulings pertaining to mixtures of radioactive and hazardous waste, the AEA governs the radioactive portion of the waste mixture and the RCRA governs the hazardous portion. *See EPA Notice: State Authorization to Regulate Hazardous Components of Radioactive Wastes Under the Resource Conservation and Recovery Act*, 51 Fed. Reg. 24,504 (July 3, 1986); *DOE Final Rule: Radioactive Waste; Byproduct Material*, 52 Fed. Reg. 15,937 (May 1, 1987); *EPA Clarification Notice: Clarification of Interim Status Qualification Requirements for the Hazardous Components of Radioactive Mixed Waste*, 53 Fed. Reg. 37,045 (Sept. 23, 1988). Under this dual regulatory scheme, DOE has exclusive authority to regulate the radioactive component of waste mixtures, whereas EPA -- or states authorized by EPA under the RCRA - retain the authority to regulate the hazardous portion. *See In re Westinghouse Materials Co. of Ohio*, 1991 EPA ALJ LEXIS 19, No. RCRA-V-W-89-R-11, 1991 WL 303402 (E.P.A. Dec. 31, 1991) (applying dual regulatory scheme to disposal of waste mixtures). Based on the agencies' interpretation of the AEA and the RCRA, the district court concluded that the Cabinet's attempt to impose conditions on DOE's disposal of radioactive materials in the landfill was preempted by federal law.

On appeal, the Cabinet objects to the district court's conclusion on several grounds. The Cabinet first asserts that the challenged permit conditions are not preempted by the AEA because the Cabinet has the statutory authority under Kentucky law to regulate solid waste disposal. Thus, the Cabinet contends that the challenged permit conditions do not constitute regulation of radioactive materials, but rather merely address the fact that DOE's solid waste may be contaminated with radionuclides. The Cabinet further argues that the district court failed to support its conclusion with specific factual findings as to how the permit conditions conflict with the requirements of the AEA. Because the AEA does not expressly address the disposal of solid waste contaminated with radionuclides, the Cabinet argues, it was error to conclude that the AEA preempts the permit conditions without finding actual conflicts between the state and federal requirements.

The Cabinet's arguments are not well-taken. As the Supreme Court unequivocally stated in *Pacific Gas & Electric*, "the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states." 461 U.S. at 212. Accordingly, the AEA preempts any state attempt to regulate materials covered by the Act for safety purposes. *See id.* Here, the challenged permit conditions specifically limit the amount of "radioactivity" and "radionuclides" that DOE may place in its landfill. The sources of such "radioactivity" and "radionuclides" are materials covered by the AEA, *i.e.*, source, special nuclear, and byproduct materials. The Cabinet seeks to impose these conditions to protect human health and the environment. The permit conditions therefore represent an attempt by the Cabinet to regulate materials covered by the

AEA based on the Cabinet's safety and health concerns, and are thus preempted.

The fact that the Cabinet is authorized, under state law, to regulate solid waste disposal is irrelevant to our preemption analysis. Thus, the Cabinet's reference to its state law authority to ensure that only solid waste is placed in the landfill misses the point.[2] The disposal limits imposed by the challenged conditions constitute regulation of materials covered by the AEA. They are therefore preempted. Similarly, the Cabinet's assertion that it has the "right under state law" to prohibit any radioactive materials from being placed in the landfill is incorrect. The Supreme Court rejected a similar argument in *Pacific Gas & Electric*:

> Respondents . . . argue . . . that although safety regulation of nuclear plants by states is forbidden, a state may completely prohibit new construction until its safety concerns are satisfied by the federal government. We reject this line of reasoning. State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns . . . .

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[2] DOE argues that the Cabinet incorrectly characterizes Kentucky law as authorizing it to ensure that only solid waste is placed in the landfill. Because the extent of the Cabinet's state law authority to regulate solid waste is irrelevant to our preemption analysis, however, we need not address DOE's argument based on Kentucky law.

461 U.S. at 212.

While federal law does not preempt state regulation of solid waste, *see City of Philadelphia v. New Jersey*, 437 U.S. 617, 620-21 n.4, 57 L. Ed. 2d 475, 98 S. Ct. 2531 (1978), states may not regulate the radioactive component of solid waste. As the district court correctly concluded, DOE has exclusive authority to regulate the radioactive component of waste mixtures, whereas EPA -- or states authorized by EPA under the RCRA -- retain the authority to regulate the non-radioactive portion. *See In re Westinghouse Materials Co. of Ohio*, 1991 EPA ALJ LEXIS 19, 1991 WL 303402, at *6-8 (applying dual regulatory scheme to disposal of waste mixtures). Because the challenged permit conditions regulate materials covered by the AEA, they are therefore preempted.

The Cabinet relies on the Tenth Circuit's decision in *United States v. New Mexico*, 32 F.3d 494 (10th Cir. 1994), to rebut this conclusion. In *New Mexico*, the United States challenged permit conditions imposed by the state addressing the presence of radionuclides in the incineration of hazardous waste at a DOE facility. *Id.* at 495. The case presented the question of whether the permit conditions were within the scope of the RCRA's waiver of federal sovereign immunity. *Id.* at 496. The court held that conditions imposed by the state on DOE's hazardous waste incinerator were "requirements" under state law, and thus were applicable to the DOE facility under the RCRA. *Id.* at 498. The court expressly noted, however, that DOE did not raise the issue of whether the conditions were preempted by the AEA as state regulation of radioactive materials; rather, DOE relied solely on its argument that the conditions were not "requirements" under the RCRA's waiver provision. *Id.* at 498 n.4. Thus, New

Mexico did not address the same issue presented in this case, *i.e.*, whether state regulation of the radioactive component of solid waste is preempted by the AEA. The Cabinet's reliance on *New Mexico* in support of its preemption argument is misplaced.

The Cabinet's argument that the district court erred in failing to identify specific conflicts between the challenged conditions and federal law also must fail. As noted previously, the Supreme Court has stated that the AEA preempts the field of state regulation of radioactive materials. *Pac. Gas & Elec.*, 461 U.S. at 212. "When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether 'the matter on which the state asserts the right to act is in any way regulated by the federal government.'" *Id.* at 213 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)). Under such test, DOE need not identify specific conflicts between the Cabinet's permit conditions and federal law in order to establish preemption. The district court's failure to make specific factual findings regarding the conflict between the federal and state requirements was therefore not in error.

C. Federal Sovereign Immunity

DOE also argues that the Cabinet's challenged permit conditions are invalid because the United States has not waived its federal sovereign immunity to state regulation of radioactive materials at federal facilities.

The federal government is immune from state regulation except to the extent waived. *See United States v. Mitchell*, 445 U.S. 535, 539, 63 L. Ed. 2d 607, 100 S. Ct. 1349 (1980). The Supreme Court has held that waivers of federal immunity must be unequivocal, *id.* at 538, and are to be strictly construed in favor of the United States, *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 117 L. Ed. 2d 181, 112 S. Ct. 1011 (1992). The issue of whether the United States has waived its sovereign immunity is a question of law subject to de novo review. *See United States v. $ 515,060.42 in U.S. Currency*, 152 F.3d 491, 504 (6th Cir. 1998).

While the district court did not address DOE's sovereign immunity argument in light of its holding that the Cabinet's regulations are preempted by federal law, DOE could have prevailed on this alternate theory as well. Neither the AEA nor any other federal law waives federal immunity from regulation of DOE facilities by states with respect to materials covered by the AEA. While the Cabinet is correct to point out that the RCRA waives federal immunity to state regulation of federal facilities with respect to solid waste, *see* 42 U.S.C. § 6961(a), the RCRA's definition of "solid waste" expressly excludes materials covered by the AEA, *see* 42 U.S.C. § 6903(27). As discussed previously, the Cabinet's permit conditions constitute state regulation of source, special nuclear, or byproduct material, as defined by the AEA. Accordingly, the United States has not waived its immunity from the permit conditions at issue. We therefore affirm the district court's judgment on this alternate ground.

D. Abstention

Aside from its preemption argument, the Cabinet contends that the district court should have abstained from hearing this case based upon the discretion accorded it under the Declaratory Judgment Act and the *Burford* abstention doctrine. While we normally review *de novo* a district court's decision to abstain, *see Fed. Express Corp. v. Tennessee Pub. Serv. Comm'n*, 925 F.2d 962, 967 (6th Cir. 1991), we have at least on one occasion reviewed such a decision for abuse of discretion, *see Romine v. Compuserve Corp.*, 160 F.3d 337, 341, 343 (6th Cir. 1998). As the Second Circuit has noted, however, "there is little practical distinction between review for abuse of discretion and review *de novo*" in abstention cases, inasmuch as the district court's discretion to abstain "is narrowed by a federal court's obligation to exercise its jurisdiction in all but the most extraordinary cases." *Hachamovitch v. DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998).

The Cabinet's abstention argument is two-fold. First, it contends that the district court should have declined jurisdiction over DOE's complaint based upon the discretion accorded it under the Declaratory Judgment Act, 28 U.S.C. § 2201. *See Brillhart v. Excess Ins. Co. of America*, 316 U.S. 491, 86 L. Ed. 1620, 62 S. Ct. 1173 (1942) (ordering federal district court to dismiss § 2201 action in favor of pending state court proceeding). The Cabinet further asserts that the judicially-created doctrine of abstention set out in *Burford v. Sun Oil Co.*, 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943), and its progeny required the district court to decline jurisdiction over this case. Neither of the Cabinet's abstention arguments has merit.

In a case procedurally similar to this one, we addressed the "interplay between preemption and abstention" presented here:

> When state and federal courts have concurrent jurisdiction to decide preemption questions, a federal court should abstain to allow the state court to consider the preemption issues. However, . . . if the issues present facially conclusive claims of federal preemption, we will not abstain, but instead will decide the preemption question.

GTE Mobilnet, 111 F.3d at 475. *See also New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 362, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) (noting that where determination of preemption claim would not disrupt state's attempt to ensure uniformity in treatment of an essentially local problem, abstention is not required); *Bunning v. Commonwealth of Kentucky*, 42 F.3d 1008, 1011 (6th Cir. 1994) (concluding that "abstention is not required in a case presenting facially conclusive claims of federal preemption, where resolution of the dispute does not require the court to interpret state law or make factual findings"); *Norfolk & W. Ry. Co. v. Pub. Utilities Comm'n*, 926 F.2d 567, 573 (6th Cir. 1991) ("Abstention is not required when the naked question, uncomplicated by ambiguous language, is whether the state law on its face is preempted.")

In light of the foregoing principles, the district court in this case correctly found that abstention was inappropriate. DOE's action for declaratory and injunctive relief presented a facially conclusive claim of federal preemption, inasmuch

as a determination of the preemption question did not require a "detailed analysis of state law," *GTE Mobilnet*, 111 F.3d at 478, or the "making of findings on disputed facts," *Norfolk & W. Ry. Co.*, 926 F.2d at 573. Indeed, the district court was not required to inquire "beyond the four corners" of the challenged state order in resolving the preemption question. *New Orleans Pub. Serv., Inc.*, 491 U.S. at 363. Because DOE presented a facial preemption claim, the district court properly found that it should not abstain in deference to the state court proceeding.

None of the judicially-created abstention doctrines cited by the Cabinet refute this conclusion. In *Brillhart*, the Supreme Court held that a federal court may abstain from exercising its jurisdiction in a declaratory judgment action "where another suit is pending in a state court presenting the same issues, *not governed by federal law*, between the same parties." *316 U.S. at 495* (emphasis added). Here, the essence of DOE's complaint is that the AEA preempts the conditions imposed by the Cabinet in the landfill permit. Such a claim presents an issue of federal law. *See Musson Theatrical, Inc.*, 89 F.3d at 1257. Thus, the reasoning of *Brillhart*, which expressly applies only to declaratory judgment actions "not governed by federal law," 316 U.S. at 495, does not support abstention in this case.[3]

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[3] In support of its abstention argument under *Brillhart*, the Cabinet relies on *International Association of Entrepreneurs v. Angoff*, 58 F.3d 1266 (8th Cir. 1995). The court in *Angoff* affirmed the district court's decision to abstain because it found the plaintiff's federal suit to be an "attempt to circumvent the removal statute's deadline by using the Declaratory Judgment Act as a convenient and temporally unlimited back door to federal court." *Id.* at 1270. Here,

Neither does the Supreme Court's decision in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976), favor abstention. In *Colorado River*, the Supreme Court held that, in rare circumstances, a federal district court may properly abstain from exercising its subject matter jurisdiction based on considerations of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Id.* at 817 (internal quotation marks and citation omitted). Factors relevant to a court's decision to abstain under *Colorado River* include: (1) whether the state court or the federal court has assumed jurisdiction over the res or property; (2) which forum is more convenient to the parties; (3) whether abstention would avoid piecemeal litigation; (4) which court obtained jurisdiction first; and (5) whether federal law or state law provides the basis for the decision on the merits. *See Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 15-16, 23, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983).

On balance, these factors weigh strongly against abstention in this case. While neither the federal court nor the Kentucky state court has assumed jurisdiction over property

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DOE's declaratory judgment action is not an attempt to avoid defending against a state court action. Rather, DOE has a compelling interest in choosing a federal forum to seek a declaration of its federal statutory immunity from state regulation. *See United States v. Pennsylvania*, 923 F.2d 1071 (3d Cir. 1991) (holding that district court should not have abstained in light of federal government's right to seek declaration of immunity under federal statute in the federal forum of its choice). Thus, the Cabinet's reliance on *Angoff* is misplaced.

in this case, and neither party has alleged that one court is significantly more convenient than the other, the remaining factors favor federal court resolution of this dispute. The federal case will resolve the entire dispute between DOE and the Cabinet, such that abstention is not required to avoid piecemeal litigation. Although DOE instituted the Kentucky state court action just prior to filing suit in federal court, the federal case has been fully litigated whereas no action has been taken by the parties in the state case. Finally, federal law provides the basis for the decision on the merits. Thus, the Cabinet's argument under the *Colorado River* abstention doctrine is not well-taken.

Finally, the Cabinet's argument for abstention under *Burford* also must fail. *Burford* abstention applies (1) if a case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar," or (2) if the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River*, 424 U.S. at 814.

Neither of these two circumstances is presented here. As previously noted, this case involves a question of preemption under federal law, not a question of state law. Thus, the Cabinet cannot satisfy the first ground for *Burford* abstention. *See New Orleans Pub. Serv., Inc.*, 491 U.S. at 362-63 (holding that *Burford* abstention is not justified where no difficult question of state law is presented). Nor can the Cabinet satisfy the second ground for *Burford* abstention. The district court's adjudication of DOE's action does not stand to disrupt Kentucky's efforts to establish a coherent policy with

respect to solid waste management, except to the extent such policy oversteps Kentucky's authority by regulating radioactive materials. "There is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy." *Id.* at 363 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 380 n.5, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978)). *Cf. Coalition for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1194-95 (6th Cir. 1995) (distinguishing *New Orleans Public Service, Inc.* on the grounds that plaintiffs' federal court claims in *LWD* could not be decided without interfering with Kentucky's policies governing the issuance of hazardous waste incineration permits.)

Accordingly, we find that the district court did not err in refusing to abstain in this case, notwithstanding the concurrent pending litigation between the same parties in Kentucky state court.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the decision of the district court in its entirety.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[June 5, 2001, Filed]

No. 00-5247

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
COMMONWEALTH OF KENTUCKY; KENTUCKY NATURAL RESOURCES & ENVIRONMENTAL PROTECTION CABINET, SECRETARY, Defendants-Appellants.	)

Before: NORRIS and COLE, Circuit Judges; and STEEH, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Western District of Kentucky at Paducah.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED in its entirety.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY PADUCAH DIVISION

[Filed December 17, 1999]

NO. 5:99CV-87-R

UNITED STATES OF AMERICA,
Plaintiff,
v.
COMMONWEALTH OF KENTUCKY, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

Upon Defendants' Motion to Reconsider and the Court being fully advised,

IT IS ORDERED THAT Defendants' Motion to Reconsider is DENIED and the case is DISMISSED.

DISCUSSION

In reviewing Defendants' Motion to Reconsider and Plaintiff's response, the Court concludes that no new legal issues have been raised and denies Defendants' Motion to Reconsider.

Despite this holding, the Court will take this opportunity to insure that portions of that opinion are clear. Defendants argue that their regulations regulate only the solid waste portion of the mixture and have a mere incidental impact on the source, special nuclear and byproduct material portion.[1] This Court disagrees. Semantical arguments hold little weight. Whether terming its regulation as direct, indirect or incidental, Defendants cannot effect regulations that result in the regulation of the source, special nuclear and byproduct material portion of a solid waste mixture. The inseparable nature of waste mixtures does not effect this result. *See Director, Waste Manag. Div., Reg. v. U.S. Envtl. Protection Agency v. Westinghouse Materials Co. of Ohio, Inc.*, 1991 WL 303402 (EPA Dec. 31, 1991)(rejecting the argument that the inseparable nature of waste eliminates the ability for dual regulation of waste mixtures). Inasmuch as the regulations effect any type of regulation on the source, special nuclear and byproduct material, the regulation is improper and preempted by the Atomic Energy Act.

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[1]The Court clarifies that its decision applies to the mixture at issue whether it be a solid/nuclear waste mix or a hazardous/solid waste mix.

Defendants argue that the Court improperly converted a defendant's motion to dismiss into a plaintiff's motion for summary judgment. Prior to its decision, the Court informed both parties that the decision would address preemption and that it was the Court's position that a ruling on preemption would effectively end the case in a dismissal in favor of one party. The parties agreed with this approach and articulated the position that a legal determination of preemption would terminate the case. Furthermore, a district court has the authority to enter summary judgment sua sponte as long as the party against whom judgment is entered has a reasonable opportunity to present any relevant evidence. *See Salehpour v. Univ. of Tennessee,* 159 F.3d 199, 203-04 (6th Cir. 1998). Based on the discussion with the parties and the parties' thorough and articulate briefs, the Court believes it provided this opportunity.

The Memorandum Opinion and Order (Doc. # 12-13) sufficiently addresses all issues raised by the parties. The case is DISMISSED.

This is the 17th day of December, 1999. This is a final and appealable order.

/s/_____
Thomas B. Russell, Judge
United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY PADUCAH DIVISION

[Filed November 5, 1999]

NO. 5:99CV-87-R

UNITED STATES OF AMERICA,
Plaintiff,
v.
COMMONWEALTH OF KENTUCKY, et al.,
Defendants.

ORDER

Upon Defendants' Motion to Dismiss (doc. #2), and the Court being sufficiently advised,

IT IS SO ORDERED that Defendants' Motion to Dismiss is DENIED. The Atomic Energy Act PREEMPTS Defendants' regulation of source, special nuclear and byproduct material contained in hazardous waste mixtures under the Resource Conservation and Recovery Act. The

telephonic conference previously scheduled for November 23, 1999, at 8:45 a.m. remains to determine whether further issues for resolution exist or whether this should be a final and appealable order.

This is the 5th day of November, 1999.

/s/_____
Thomas B. Russell, Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY PADUCAH DIVISION

[Filed November 5, 1999]

NO. 5:99CV-87-R

UNITED STATES OF AMERICA,
Plaintiff,

v.

COMMONWEALTH OF KENTUCKY, et al.,
Defendants.

MEMORANDUM OPINION

Defendants filed a Motion to Dismiss (doc. #2 and Reply doc. #6) to which Plaintiff responded (doc. #4). Upon consideration by the Court, Defendants' Motion to Dismiss is DENIED. Further, this Court finds that The Atomic Energy Act PREEMPTS Defendants case.

BACKGROUND

I. History

The Paducah Gaseous Diffusion Plant ("the Plant") is an active uranium enrichment facility located in McCracken County, Kentucky. The Secretary of the Kentucky Natural Resources and Environmental Protection Cabinet ("Cabinet") regulates disposal of solid waste at the Plant through the issuance of permits. In 1994, The United States Department of Energy ("DOE") submitted an application to the Cabinet for the construction and operation of a contained solid waste landfill at the Plant. Defendants allege that the permit did not indicate that the solid waste proposed for disposal contained radionuclides, although DOE did disclose this information before the Cabinet issued a permit.

In February 1995 the Cabinet issued a construction permit to DOE. The permit, Number 073-00045, authorized DOE to construct a contaminated landfill for the disposal of solid waste generated at its facility. Conditions applicable to the proposed operation of the site accompanied the permit. DOE later submitted a Construction Certification Report to the Cabinet. After verifying that DOE had completed the project according to the approved plans, the Cabinet issued a Construction/Operation Permit to DOE on November 4, 1996. The permit contained various conditions including Permit Condition 11 prohibiting solid waste that contains radioactivity above state set de minimis levels and Condition 12 prohibiting the placement of radionuclides in the landfill without the submission and approval of a Waste Characterization Plan.

DOE appealed these and other conditions through Kentucky's administrative processes. On January 15, 1999, the Hearing Officer issued a report recommending that the Secretary affirm the Cabinet's decision to impose all of the permit conditions to which DOE objected. DOE filed objections to which the Cabinet responded. On February 18, 1999, the Secretary entered a final order affirming and adopting the Hearing Officer's Report and Interim Order dismissing DOE's Appeal.

DOE timely filed a petition of the Cabinet's final action in the Circuit Court for Franklin County on March 22, 1999, appealing Conditions 11 and 12. Under Kentucky law a petition for review of the Cabinet's action must be filed in the Circuit Court for Franklin County within 30days of the Cabinet's final order. DOE alleges it filed its state court action to preserve these rights. DOE then filed the current action and moved to stay its state court action pending the result of the instant proceeding.

II. Procedural History

Plaintiff filed a Complaint for Declaratory and Injunctive Relief in the United States District Court for the Western District of Kentucky (doc. #1) on behalf of the United States Department of Energy ("DOE") on April 1, 1999. The complaint challenges the action by the Cabinet that allegedly imposed conditions relating to source, special nuclear, and byproduct materials within the meaning of the Atomic Energy Act for 1954, as amended, 42 U.S.C. § 2011 et seq., ("AEA"), in Solid Waste Disposal Facility Permit Number 073-00045 ("Permit"). The Permit involves DOE's C-746-U solid waste contaminated landfill at the Paducah

Gaseous Diffusion Plant in McCracken County, Kentucky. The United States challenges these Permit conditions on the grounds that the entire field relating to AEA materials has been preempted by federal statute, that the Permit conditions violate the United States' immunity from state regulation, and that the State has failed to comply with its own statutes and regulations in imposing the conditions.

Defendants filed a Motion to Dismiss. Defendants argue that this case should be dismissed for a number of reasons: (1) that this Court should decline jurisdiction over this matter based upon the discretion accorded it under 28 U.S.C.§ 2201, commonly known as the Declaratory Judgment Act, and under the Burford abstention doctrine; *See Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); (2) that DOE's preemption and sovereign immunity claims should be dismissed for failure to state a claim from which relief can be granted; (3) that KRS Chapter 224 provides statutory authority for the permits in question; and (4) that the permits in question do not violate KRS 13A. 130.

STANDARD

A "district court's grant of a motion to dismiss is proper when there is no set of facts that would allow the plaintiff to recover." *Persian Galleries, Inc. v. Transcontinental Ins. Co.*, 38 F.3d 253, 258 (6th Cir. 1994).

DISCUSSION

This Court must resolve the issue of preemption before answering any other question. Defendants and Plaintiff's

arguments turn on how the law characterizes a mixture of hazardous and source, special-nuclear or byproduct material waste and whether the Resource Conservation and Recovery Act or the Atomic Energy Act governs all or a portion of this mixture. The Sixth Circuit Court of Appeals has concluded that abstention is not required in a case presenting facially conclusive claims of federal preemption, where the resolution of the dispute does not require the court to interpret state law or make factual findings. *See Bunning v. Kentucky,* 42 F.3d 1008 (6th Cir. 1994). This Court finds that although the Resource Conservation and Recovery Act generally governs waste mixtures containing hazardous waste, the Atomic Energy Act preempts Defendants' regulation of the source, special-nuclear and byproduct component of "a hazardous waste mixture under the Resource Conservation and Recovery Act. Because the Atomic Energy Act preempts Defendants' actions, this Court will not address the alternative arguments raised by Defendants and Plaintiff.

I. Introduction

Congress created the Atomic Energy Act of 1954, Act of Aug. 30, 1954, ch. 1073, 68 Stat. 919, as amended, 42 U.S.C. §§ 2011-2281 (1976), to serve the national interest in promoting the development of atomic energy for peaceful purposes under a program of federal regulation and licensing. *See Pacific Gas and Electric Power v. State Energy Resources Conservation & Devel. Comm.,* 461 U.S. 190, 206-07, 103 S.Ct. 1713, 1723-24, 75 L.Ed.2d 752(1983). Congress gradually increased the roles of states and private entities in regulating and controlling the power, but always reserved the right to protect against radiation hazards. *See id.* at 210, 103 S.Ct. at 1725. This dual structure has been maintained. States

exercise their traditional authority over the need for additional generating capacity, the types of facilities to be licensed, land use, etc., while the federal government maintains complete control of the safety and "nuclear" aspects of energy generation. *See id.* at 211-12, 103 S.Ct. at 1726.

Congress enacted the Resource Conservation and Recovery Act ("RCRA") to end the environmental and public health risks associated with the mismanagement of hazardous waste. *See Sierra Club v. United States Dept. of Energy*, 734 F.Supp. 946, 947 (D.Colo. 1990). Generally, RCRA prohibits the treatment, storage or disposal of hazardous waste at both private and governmental facilities without a permit issued by EPA or an authorized state. *See id.;* 42 U.S.C. § 6925(a) and § 6961. Hazardous waste includes types of solid waste that for enumerated reasons create public health and environmental dangers. *See* 42 U.S.C. § 6903(5). Under RCRA, hazardous waste is a type of solid waste: The term "solid waste" does not include "source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954." *See* 42 U.S.C. § 6903(27). The Atomic Energy Act ("AEA") governs these items and preempts RCRA. *See* 42 U.S.C. § 6905(a).

DOE's C-746-C facility is a contained landfill for the disposal of solid waste. Regulation governs what type of waste may be disposed in the contained landfill. The landfill is designed to take "all nonhazardous solid wastes including residential, commercial, institutional, industrial and municipal waste, shredded tires, household hazardous waste, limited quantity generator hazardous waste and non hazardous spill cleanup residue." 401 KAR 47:080, Section 2(1). The Cabinet's regulations require a permit applicant to describe

the chemical, physical and biological characteristics of the solid wasted they plan to place in the landfill. *See* 401 KAR 47:170, Section 2(11). Here, DOE admits that the solid waste it intends to dispose of contains "incidental radioactivity" deriving from source, special nuclear, or byproduct material. As such, a combination of hazardous waste and source, special nuclear, or byproduct material comprise the waste in question.

Although RCRA governs the disposal of hazardous waste and AEA governs the disposal of source, special nuclear and byproduct material, no statute specifically delegates the authority to regulate a mixture of the two types of waste. When Congress explicitly leaves a gap for an agency to fill, the agency regulates this area through its own rules. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). Sometimes, Congress's delegation occurs implicitly. *See id.* When this occurs, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation by the administrator of an agency." *Id.* A court should give considerable weight to an executive department's construction to a statutory scheme it administers and deference to its administrative interpretations. *See id.* A court should not interfere unless the accommodation is not one that Congress would have sanctioned. *See id.*

Since RCRA and AEA do not address the hazardous/source, special nuclear or byproduct material mixture, the agency rules should govern. The position espoused in rules and regulations and case law has varied and left this Court with the task of filtering through an incoherent

body of policy. DOE and EPA are in agreement that RCRA and AEA jointly regulate hazardous/radioactive waste mixtures. *See* DOE Final Rule, 52 Fed. Reg. 15,937 (May 1, 1987); EPA Notice, 51 FR 24504-01 (July 3, 1986); EPA Clarification Notice, 53 FR 37045 (sep. 23, 1988); *Director, Waste Manag. Div. Reg. v. U.S. Envtl. Protection Agency v. Westinghouse Materials Co. of Ohio, Inc.*, 1991 WL 303402 (EPA Dec. 31, 1991). AEA governs the radioactive portion of the waste mixture and RCRA governs the hazardous portion. *See id.* Case law addresses somewhat similar issues, but reaches opposite results. This Court adopts the agencies' view finding it consistent with the Congressional goals behind both AEA and RCRA. It allows the federal government to protect nuclear safety concerns while also allowing EPA and states to protect against the environmental and public health concerns associated with hazardous waste.

II. Agency Views

In its Rules and Regulations, DOE considered the regulation of a waste mixture containing both hazardous waste and source, special nuclear or byproduct material waste in DOE Final Rule, 52 Fed. Reg. 15,937 (May 1, 1987). The Final Rule contains the following language:

> It seems apparent that RCRA was intended to have some applicability to materials that were already regulated under the AEA. Section 1006(a) of RCRA, 42 U.S.C. 6905(a), specifies that as to 'any activity or substance' subject to the AEA, RCRA regulation must yield, but only to the extent of 'inconsistent' requirements stemming from the AEA. The

- archetypal 'substances' that can fairly be described as 'subject to' the AEA are substances containing source, special nuclear and byproduct material, to which the AEA expressly is directed. Thus the language of section 1006(a) seems to contemplate complementary regulation under both statutes of substances that under prior law might have been regulated exclusively by the AEA. Viewed in this light, RCRA's definitional exclusion of source, special nuclear and byproduct material assumes a narrower significance than was suggested in the proposed rule. Instead of referring to any waste stream in its entirety, the exclusion appears directed only to the radioactive component of a nuclear waste. The result, however, is a more harmonious view of the statute as a whole. Read together, *DOE believes that the definitional exclusion and the language of section 1006(a) are correctly understood to provide for the regulation under RCRA of all hazardous waste, including waste that is also radioactive. RCRA does not apply to the radioactive component of such a waste, however, if it is source, special nuclear or byproduct material Instead, the AEA applies to that radioactive component. Finally, if the application of both regulatory regimes proves conflicting in specific instances, RCRA yields to the AEA.*

DOE Final Rule, 52 Fed. Reg. 15,937, 15,940 (May 1, 1987)(emphasis added). This ruling articulates the position that AEA regulates the source, special nuclear, or byproduct material component of a mixture of hazardous material and source, special nuclear, or byproduct material rather than RCRA. EPA interpreted the same issue and reached the same conclusion as DOE. *See* EPA Notice, 51 FR 24504-01 (July 3, 1986); EPA Clarification Notice, 53 FR 37045 (Sep.23, 1988)(concurring with DOE's May 1, 1987, Final Order in finding that AEA governs the source, special nuclear, and byproduct material component of a hazardous/radioactive mixture and that RCRA governs the hazardous portion).

EPA applied this position in a 1991 holding. *See Director, Waste Manag. Div, Reg. v. U.S. Envtl. Protection Agency v. Westinghouse Materials Co. of Ohio, Inc.*, 1991. WL 303402 (EPA December 31, 1991). In *Westinghouse,* Westinghouse argued that all of the mixed waste produced at a facility was exempt from RCRA's regulation of hazardous waste because the waste contained uranium, a source material. Westinghouse argued that virtually all radioactive waste substances are contained, dissolved or suspended in a non-radioactive medium from which their physical separation is impracticable. As such, they argued that the entire mixture that contained source, special nuclear or byproduct material should be governed entirely by AEA instead of jointly with RCRA. EPA rejected this argument. In so holding, EPA noted that EPA and DOE agree on a dual-regulatory scheme where DOE via AEA regulates the source, special nuclear, and byproduct material component of waste mixtures while

EPA[1] via RCRA regulates the hazardous portion.[2]

IV. Case View

Defendants rely heavily on analogies to case law to support their position. In *United States v. New Mexico,* 32 F.3d 494 (10th Cir. 1994), New Mexico implemented statutes designed to permit the safe burning of both radioactive and hazardous waste. The Tenth Circuit held that New Mexico's issuance of a hazardous waste incinerator permit to DOE that contained permit conditions addressing radioactive waste was not the regulation of such waste. *See id.* The Court applied a "substantial regulation" test. *See id.* at 499. Under the test a state does not overstep its powers under RCRA to regulate hazardous waste so long as its regulation does not attempt to

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[1]or an authorized state

[2]Both parties discuss the dual regulatory scheme in the memorandum's accompanying the instant motion. Plaintiff uses the authority of the agency opinions and asserts that the dual regulatory scheme preempts Defendants from regulating the source, special nuclear, and byproduct components of the waste mixture. (Doc.#4 at 18.) Defendants also recognize the dual regulatory scheme. They do not contest dual regulation, but instead assert that "the preemption issue becomes one of whether the provisions conflict in any way... DOE has not alleged that Conditions 11 and 12 conflict with any provision of the AEA. It is clearly DOE's burden to establish such a conflict." (Doc. #2 at 20.) Plaintiff responds that it has met this burden as it alleged in its complaint that the specific permit conditions at issue are inconsistent with AEA. From this exchange, it appears that both the Defendants and Plaintiff agree that a dual regulatory scheme governs.

"substantially regulate" .radioactive waste, i.e., when the regulation is nothing more than another tool for the state to implement its statutory and regulatory hazardous waste provisions. *See id.* at 497-98. In *New Mexico,* the court found that the state satisfied the test because the court determined that the permit conditions merely allowed New Mexico to meet the requirement that only hazardous waste be disposed of under a hazardous waste permit. *See id.* Defendants argue the instant case is factually analogous to *New Mexico* because Kentucky's permit requirements are designed to insure that only solid waste is disposed in a solid waste landfill.

Although the cases share factual similarities, the parties here raise different legal issues. *New Mexico* did not address the preemption issue now before the court. Instead, the court reached its conclusion by determining whether permit conditions were "requirements" under the federal immunity section of RCRA. *See id.* Because of these differences, it would be inappropriate to apply the "substantial regulation" test here as the same considerations were not before the court in New Mexico. The agency interpretation governs.

A second case addresses issue similar to those before this Court. In *Sierra Club v. United States Dept. of Energy,* 734 F.Supp. 946 (D. Colo. 1990), the court held that hazardous waste remained subject to RCRA even when mixed with other substances like radioactive waste.[3] In reaching this

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[3]DOE did not dispute RCRA's coverage of the mixed waste, but instead contested the application of RCRA because it would violate preexisting contracts.

decision, the court looked at the difference between hazardous/radioactive mixtures where the radioactive material would be extracted and recycled and hazardous/radioactive waste mixtures where the radioactive material is intended purely for disposal. The court found that the waste at issue was intended purely for disposal and that plutonium would be salvaged from the incinerated remains. When the ultimate end for the waste is disposal, the court held it should be classified collectively as hazardous waste despite its radioactive component. "The balance of the waste is hazardous waste, even if contaminated with plutonium and it remains subject to regulation unless it is in-process, secondary material passing in a continuous stream from one production process to another." *Id.* at 949.

Sierra Club proves problematic because its foundation is not an analogue to the situation in the case it decides. The court in *Sierra Club* discusses the "mixture rule," the "derived from rule," and other regulations, none of which arose or were previously applied in the context of source, special nuclear or byproduct material waste. *See* James E. Satterfield, *EPA's Mixture Rule: Why the Fuss?*, 24 Envtl. L. Rep. 10712 (1994) (discussingthe mixture of hazardous and nonhazardous waste and stating that the agency could not rely on the rule for radioactive/hazardous combinations because the rule only applies to hazardous/nonhazardous combinations); 52 Fed. Reg.15937, 15940(May 1, 1987)(stating that "RCRA does not apply to the radioactive component of such a waste if it is source, special nuclear or byproduct material"); *American Mining Congress v. EPA,* 824 F.2d 1177 (D.C.Cir. 1987)(discussing the disposal of petroleum). Under the mixture rule, hazardous waste retains its classification as hazardous waste even when mixed with

other substances. DOE created the mixture rule, however, to address concerns about hazardous and nonhazardous waste mixtures. Some feared that individuals would mix hazardous and nonhazardous substances together in order to reclassify the waste and circumvent hazardous waste safety regulations. The mixture rule prevents this result by providing that regulators should treat such mixtures as hazardous waste. The issue of hazardous and source, special nuclear or byproduct material waste regulation raises very different issues as Congress has already created regulations to safeguard each waste type, thus leaving the mixture rule inapplicable. *See Satterfield*, 24 Envtl. L. Rep. 10712. As such, applying the mixture or derived from rule would be inappropriate.

CONCLUSION

Both DOE and EPA have given their interpretations. DOE, EPA and states expend great effort and resources to develop regulatory regimes such as the ones at issue in this case. In order for them to accurately predict the reliability and enforceablity of such regimes, courts must provide a consistent framework within which to operate. Congress did not provide guidance in this area. The Supreme Court has held that in the absence of statutory provisions, courts should follow reasonable agency decisions. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843,104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984). This Court follows the Supreme Court's direction by deferring to the interpretation of DOE and EPA. The agencies' interpretation is reasonable and consistent with the Congressional purposes of both RCRA and AEA. It allows the federal government to protect nuclear safety concerns while also allowing EPA and states to protect against the

environmental and public health concerns associated with hazardous waste. As such, this Court concludes that AEA governs the source, special nuclear and byproduct components of hazardous and radioactive waste mixtures. RCRA governs all other portions of the mixture. AEA preempts Defendants' regulation of the source, special nuclear and byproduct components of hazardous waste mixtures.

An appropriate order shall issue. This is the 5th day of November, 1999.

/s/_____
Thomas B. Russell, Judge
United States District Court